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The Difficult Politics of Trade Reorganization

by
Robert S. Strauss†

Trade policy is formulated not only in light of the need to promote domestic objectives, which may be conflicting, but also to accommodate a changing international environment. The commonly accepted objective of United States trade policy, in the immediate post-Second World War years and after, was to assist the growth of a truly open-market international trading system, one which would promote political stability. Today's international trading environment is quite different from that which existed only a decade ago. Due to increased vulnerability to the mercantilist policies of other nations, the United States has begun to formulate a trade policy which will enable it to become more competitive in world markets. A current issue on the political agenda is whether the present system of trade administration is sufficient, or whether, as proposed by the Reagan administration, the system needs to be restructured.¹ This Article will evaluate the Reagan proposal in light of the postwar historical and ideological influences upon American trade strategies, as well as the operation of the present system of trade administration.

I

POSTWAR INFLUENCES UPON U.S. TRADE POLICY

After much of the world's economy was destroyed in World War II, the prevailing view was that laissez-faire was the most appropriate approach for the reconstruction of an international economic order. The Marshall Plan, a popular initiative in the United States, enabled Europe to regain its footing and rebuild essential manufacturing facilities on a modern foundation. Years of massive U.S. economic and technical assistance to

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1. The President's trade proposal consists substantially of Bill S. 121, submitted by Senator William Roth (R-DE), 98th Cong., 1st Sess. (1983). For the text of S. 121, see 129 CONG. REC. 591 (daily ed. Jan. 26, 1983). Other reorganization plans of similar scope and intent have emerged, including several proposals from Democratic members of Congress. See, e.g., H.R. 4432, submitted by Representative Don Bonker (D-WA), 98th Cong., 1st Sess. (1983). For a discussion of the merits of the Bonker proposal, see *infra* Peyser, *Executive Organization and International Trade*, 2 INT'L TAX & BUS. LAW. 138 (1984). The Democratic proposals are distinguished by provisions that would require implementation of industrial policy. See, e.g., H.R. 4432 at tit. V.

Japan and other areas of the free world produced similar results. In both theory and practice, U.S. policy objectives came close to realization in the decade between 1963 and 1973, when world production and trade grew at average annual rates of between 6% and 8.5%². With the possible exception of textiles, U.S. manufacturing industries were rarely threatened by import competition during this period.

Today, the tables have turned on U.S. industry. Many Americans feel threatened by increased foreign competition. In a trading community dominated by the mercantilist approaches of several nations, the adoption of unrestricted free trade policies by the United States is feared to result in the destruction of a number of its basic industries, including textiles and steel. Apart from massive unemployment, the demise of these basic industries would threaten the national security. The laissez-faire approach of the post-war international trading system, reflected in current trade policy, may not represent an adequate response to those feelings. As long as industrial development in the United States remained strong relative to the rest of the world, the nation's economic autonomy remained largely unchallenged and trade policy was epitomized by free trade. However, in light of the growth of world production and international trade, and the increased incidences of import competition seriously injuring domestic manufacturing industries,³ present attitudes seem to favor a re-thinking of the post-war attitude toward trade.

In contrast to the United States, some of our trading partners have been able to mold their trade policies to meet the challenges posed by the changing international environment, possibly to the detriment of U.S. trade. The European Communities and Japan, historically lacking the economic autonomy enjoyed by the United States, have long recognized the economic value of successful participation in international commerce. In order to enhance their export potential, these nations have developed intricate systems of subsidies and barriers which, in combination, raise formidable trade obstacles for U.S. industries. For example, many of our trading partners have developed export programs and import procedures that are, in actuality, only thinly disguised forms of mercantilism.⁴ Certain nations are especially adept at implementing non-tariff barriers, ranging from tough

2. *Prospects for International Trade*, GATT Press Release, Aug. 30, 1983.

3. More than one-sixth of everything grown or manufactured worldwide is traded internationally. Office of the Special Trade Representative to Trade Negotiations, Pub. NV. 6-8, the MTN Package 1 (1979).

4. See generally, Zysman & Cohen, *The Mercantilist Challenge to the Liberal International Trade Order*, 1 INT'L TAX & BUS. LAW. 1 (1983). For a list of current petitions of domestic industries seeking import relief from increased foreign competition, see DEP'T OF COMMERCE SEMI-ANNUAL REPORTS. See also Fisher & Steinhardt, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services and Capital*, 14 L. & POL'Y INT'L BUS. 569 (1982).

performance standards to import testing procedures.⁵ These impediments to freer trade not only have the effect of derogating from the General Agreement on Tariffs and Trade (GATT),⁶ and other international agreements in force, but also thwart the best efforts of American companies to compete in international markets.

The natural response in the United States to this sort of conduct by other countries is to retaliate by developing similar restrictive trade policies of our own. However, there are several factors which limit the policy alternatives available to the United States. First, the world leadership position of the United States, and its preeminent role in the Western Alliance, makes outright economic retaliation impractical and unwise. The United States has an obligation to encourage its trading partners to loosen restraints on trade and reach compromises through dispute settlement mechanisms.

Second, the formulation of trade policy has also been influenced by a tendency to view foreign trade as an element of foreign policy, that is, as a political weapon.⁷ Controls on the transfer of goods and services for the Soviet bloc raise the issue of the future of East-West trade. National security controls on the transfer of goods and services with actual or potential military application to the Soviet bloc are reasonable and, to a greater or lesser extent, firmly agreed to by other nations in the Western Alliance. Yet foreign-policy controls on the sale of non-military goods and services raise questions of the capacity of the United States to invoke treaty obligations to achieve unilateral foreign policy objectives. Over the long run, the United States will face numerous difficulties by attempting to impose these policies on its allies. The evidence suggests that the European Community and Japan may be far less compliant on matters of this kind than in the past.⁸

5. For example, approximately sixty percent of U.S. exports to Japan are subject to "on-the-dock" inspection or forms of product testing. Recent progress has been made, however. In 1983, the Japanese government under strong U.S. pressure began a comprehensive review of its standards and certification systems, and other non-tariff barriers to importation. *See Bat Case May Ease U.S.-Japan Friction*, N.Y. Times, Feb. 2, 1983, p. D5, col. 6.

6. The principal instrument regulating trade among non-communist countries, the GATT, and a variety of other international accords are each built on the foundation of progressively liberalized trade. The GATT was originally intended to have only temporary effect, but the International Trade Organization (ITO) proposed by the United Nations Economic and Social Council was never established. A current text of the GATT is contained in 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969).

7. Two prime examples are the attempted boycott of goods destined for the trans-Siberian gas pipeline and the recently repealed Soviet trade embargo. For a discussion of these U.S. foreign policy export controls, see Marcuss & Mathias, *U.S. Foreign Policy Export Controls: Do They Pass Muster Under International Law?* 2 INT'L TAX & BUS. LAW. 1 (1984).

8. For example, the European Community became quite concerned about regulation amendments promulgated by the Reagan administration regarding the re-exportation of goods and technical data for use in oil and gas exploration, transmission, and refinement. The Community asserted that the amendments lacked a generally accepted basis of jurisdiction in international law and constituted an unacceptable interference with its independent commercial

Future U.S. trade policies should be formulated with this possibility in mind.

Third, trade policy has to be geared to meet the procedural and substantive provisions of the multilateral agreements, such as GATT. Since its inception in the late 1940s, the GATT has achieved notable successes in eliminating most of the high tariffs that formed the primary restraints on international commerce in the post-war period. The most recent GATT negotiating exercise, the Tokyo Round, began a process for developing mechanisms that may achieve equivalent reductions in non-tariff barriers. In particular, the Tokyo Round enabled contracting states to negotiate valuable new rules concerning, among other things, customs valuation, import licensing procedures, and product standards.⁹ Despite its evident successes in a number of areas, however, the GATT has still not proved itself able to handle the more subtle and complicated forms of trade restraints, those which frequently have the most serious and long-ranging consequences for future trade. Non-tariff barriers in the form of tax subsidies, industry loan guarantees, or foreign investment requirements have not been reduced by the GATT and pose significant obstacles to negotiated arrangements in the future. There is nothing on the horizon to lead one to believe that the GATT is going to improve its ability to deal with these serious problems.

In a similar vein, the safeguard measures permitted under the GATT, which were designed to provide nations with temporary relief from import competition, are too frequently used to delay structural economic change.¹⁰ Bilateral arrangements restraining trade in specific products and the unilateral imposition of quotas are quickly becoming the rule rather than the exception.¹¹ As a result, multilateralism, the core of the GATT, is in jeopardy. The United States needs to renew its commitment to an international trading discipline based on negotiated multilateral understandings. Most bilateral arrangements adversely affect some third parties and thereby create new problems for every one temporarily solved.

Notwithstanding the above, there are ways to avoid even the most serious of the limitations on U.S. policy alternatives posed by the present world order. Multilateral negotiations can lead to reduced trade barriers. An international commitment to freer trade can also encourage fairer trade practices by those nations most reluctant to open their markets to U.S. imports.

policy. See *European Community: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, 21 I.L.M. 891 (1982).

9. GATT, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, Report by the Director-General of GATT, Geneva, April 1979 and January 1980.

10. *Id.* Article XIX of the GATT allows contracting states to suspend trading obligations when domestic industries face serious injury. Import relief can also be obtained under the waiver and concession provisions contained in arts. XXV and XXVIII. Special concessions are granted to developing countries by art. XVIII and pt. IV of the GATT.

11. For example, the United States and Japan have bilaterally negotiated many agreements, including Japanese tariff reductions on tobacco imports. See, e.g., 46 Fed. Reg. 1388 (1980).

However, the United States will have to provide leadership, and political leaders will have to define clear national objectives to guide negotiators in seeking further trade liberalization.

II THE PRESENT TRADE ADMINISTRATION SYSTEM

Since 1934, when the Roosevelt administration obtained approval of the Reciprocal Trade Agreements Act, the Congress has periodically delegated qualified trade negotiating authority to the President.¹² This provision of the Reciprocal Trade Agreements Act of 1934 was previously codified in the Tariff Act of 1930, which remains in effect as amended by the 1979 Trade Agreements Act.¹³ The 1934 Act conferred significant latitude on the Executive Branch to manage trade matters, partly because the Congress became persuaded that only the Executive Branch could effectively engage in commercial negotiations with foreign nations. Largely as a result of the precedent set by the 1934 Act, subsequent legislative delegations have enabled the Executive Branch to maintain a high profile in trade policy formulation and implementation.¹⁴

Still, despite the prominent role in trade policy enjoyed by the Executive, the Congress retains much of its constitutional authority to regulate the nation's international commerce.¹⁵ Further, the legislative trend of recent years has been toward imposing greater restrictions on the ability of the Executive Branch to initiate untested policy initiatives, particularly when those new directions lack majority support in the Congress and among the American people.¹⁶ Ordinarily, although this is not invariably the case, an

12. For example, under the Reciprocal Trade Agreements Act of 1934, 19 U.S.C. § 1351 (1976), the President is authorized to enter into executive commercial agreements to reduce tariffs and other trade barriers. *Id.* at § 1351(a)(1).

13. The Tariff Act of 1930 as amended by the Trade Agreements Act of 1979, 19 U.S.C. §§ 1303-1677 (1982).

14. See MCGOVERN, *INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY* 55-56 (1982). McGovern notes, correctly, that recent legislation distinguishes between presidential authority to conclude trade agreements and to implement those agreements by proclamation. Therefore, although the Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1976), permitted the President to negotiate reciprocal reductions in trade barriers, the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified in scattered sections of 19 U.S.C.A. (West 1980)) was the implementing instrument for the Tokyo Round of multilateral negotiations.

15. Congress is empowered to "regulate commerce with foreign nations" and to enact all laws "necessary and proper" to exercise this power. U.S. CONST., art. I, § 8, cls. 3, 18.

16. The Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1976) established consultation procedures under which the Congress must, *inter alia*, adopt implementing legislation. Under 19 U.S.C.A. § 2112(b) (West 1980), the President is permitted to "enter into trade agreements with foreign countries or instrumentalities providing for the harmonization, reduction, or elimination of [trade] barriers (or other distortions) or providing for the prohibitions of or limitations on the imposition of such barriers (or other distortions)." However, the President must consult the House Committee on Ways and Means, the Senate Finance Committee, and "with each committee of the House and the Senate and each joint committee of the Congress which has jurisdiction over legislation involving subject matters which would be affected by such

administration will have broad foreign policy or international economic objectives which may conflict with Congressional sentiment. This was the case when the Reagan administration attempted to limit exports of equipment for the Soviet gas-pipeline. On this issue, Congress was willing to reassert its authority over foreign trade.¹⁷ Similar reaffirmations of congressional authority over trade matters are likely to become more prevalent in the future.

In an effort to reclaim some of its authority over trade policy, to resolve conflicts, and to coordinate the trade policies developed by the executive and legislative branches, Congress created the Office of the United States Trade Representative (USTR). Established in preparation for the Kennedy Round of multilateral trade negotiations, the USTR acts today as the coordinator of U.S. trade policy.¹⁸ Under the present system, actual trade policy is developed within the Trade Policy Committee, a decision-making unit, comprised of the heads of the major Cabinet-level Departments and chaired by the USTR.¹⁹ At the level on which policies are devised, the USTR, in conjunction with the Trade Policy Committee, builds a consensus among the various agencies of the national government and mediates between the diverse interests that inevitably arise in the course of serious negotiations with foreign governments.

Within the existing system, the USTR functions as an arbiter on trade policy matters. As a personal advisor to the President, the USTR fills a role somewhat analogous to that of the National Security Advisor. Apart from his function as a presidential advisor, or perhaps because of it, the USTR approaches negotiations with foreign governments from a position of strength. Foreign ministers assume that the USTR speaks, not as a government functionary, but as the President's personal emissary. The possibility exists that much of this personal authority will be lost in a changed system.

In practice, the functions of formulating, coordinating, and implementing national policies are rarely as discrete as the present administrative structure presupposes. Under the existing system, the USTR and the Trade Policy Committee share coordinating responsibilities, but do not have implementing or fact-finding authority. In the substantive areas of trade regulation, the executive departments are authorized to determine the substance of future policies in their areas of specialization.

trade agreement" before entering into any trade agreement authorized by this section. *Id.* at § 2112(c). When a trade agreement is entered into, the President submits the agreement, a draft of the implementing legislation, and proposed administrative action to implement the agreement. *Id.* at § 2112(e)(3). In order for the trade agreement to have the force of law, Congress must enact the implementing bill. *Id.* at § 2112(e)(3).

17. See S. REP. NO. 169, 96th Cong., 1st Sess. (1981).

18. See 15 C.F.R. § 2001 (1983). The USTR was originally designated Special Representative for Trade Negotiations by the Trade Expansion Act of 1962, 76 Stat. 872, *repealed by* Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1982). The name of the office was changed by Exec. Ord. No. 12188, 3 C.F.R. 131 (1980), *reprinted in* 19 U.S.C. § 2171, at 968 (1982).

19. See 15 C.F.R. § 2002 (1983).

Despite its strengths, however, the present policy-making and administrative scheme does not work as well as it might. The success of this system depends, perhaps too greatly, on the personalities at the White House, Commerce, and the USTR. To put it forthrightly, the ability of the USTR to get the President's ear is indispensable. The present structure may also be too malleable and a less than ideal scenario for a coordinated policy-making effort. On occasions, this dispersed authority leads to conflicting priorities and creates a policy-making vacuum that might be effectively filled under a more tightly organized system of administration. Given the inevitable tensions, it is conceivable that the system could break down.

III

THE REAGAN ADMINISTRATION'S REORGANIZATION PLAN

The cumulative U.S. trade deficit, the stiff international economic competition, and the relatively weak export performance of U.S. manufacturing industries point to the urgency of revising our approach to foreign commerce and devising alternative trade strategies. Given the interdependent nature of the modern trading system, most politicians in the United States recognize that these policy decisions cannot be limited to a simple choice between free trade or protectionism. Ultimately, the nation must formulate a plan suitable for encouraging expanded trading activity at home, while preserving some semblance of balance in its commercial relationships abroad.

The Reagan administration's reorganization proposal may provide a mechanism to design and implement such a plan. The substance of the reorganization proposal is as follows. The Office of the USTR, the Export-Import Bank, and the Overseas Private Investment Corporation will all be merged into a new Department of International Trade and Industry (hereinafter *Trade Department*). The *Department of Commerce* would be eliminated. Responsibilities for trade law administration, export promotion, and industrial data analyses will also be subsumed under the new Department. The Foreign Agricultural Service, which has achieved significant successes in its present form, would be retained in the Agriculture Department. Various other divisions of the Commerce Department, most notably the Bureau of the Census and the National Oceanic and Atmospheric Administration, would be removed from Commerce and placed in other departments, or reestablished as independent agencies.²⁰

In light of the number of considerations involved in trade reorganization, this is generally a sensible proposal. The strongest argument in favor of creating a Trade Department may be that effective government departments attract good people, while weak ones do the reverse. Establishing a career foreign trade service is crucial to the future success of the United

20. See S. 121 § 13, 129 CONG. REC. S596 (daily ed. Jan. 26, 1983).

States as a trading nation. Many European and Japanese negotiators demonstrate great agility and understanding at the negotiating table. Their skill is made possible by the fact that foreign negotiators are usually supported by trained and able civil servants. This is a system that the United States could duplicate. The success of the Tokyo Round was substantially due to the skills of such a group of civil servants.

Beyond these administrative considerations, there are also other advantages in consolidating most trade functions in a single unit. The United States has not accorded foreign commerce the importance within the national government that effective trade coordination requires. Conferring cabinet-level status on the foreign trade area would mean higher visibility for trade issues. The creation of a Trade Department would also send an unambiguous signal to other nations that the United States is taking serious steps to protect its trade interests.

A third argument in favor of an independent Trade Department is that such a department might also more effectively determine trade policy, particularly with regard to implementing the Tokyo Round Agreements. Many of these agreements, including those concerning government procurement practices and import licensing procedures, touch on sensitive areas of national sovereignty. Successful implementation of the Tokyo Round Agreements by the United States depends on our developing a coordinated national trade policy which may best be accomplished under a new Trade Department.

Other factors may also be important in developing an improved trading position. Sound trade policy planning requires consideration of the fact that the nature of economic competition appears to be changing. Future economic leadership will depend more heavily on invention and technological innovation than was true over the last two decades. In that case, high productivity, national savings habits, increased domestic investment, and superb marketing techniques also figure into a country's ability to compete effectively on an international scale. These are areas that need to be improved upon in the United States. A Trade Department may provide some impetus in this direction.

There are, however, other valid concerns about changing the system now in place. Although the commercial policy-making process in the United States is frequently hampered by inconsistency and incoherence, whether the country really needs a more highly organized system of trade or other economic regulation is open to debate. Foreign successes in managing trade through government agencies are often held up as examples of the effectiveness of managed trade.²¹ This results in a perception among politicians and others that managed trade abroad demands comparable responses at home. This perception may simply be wrong.

21. *See generally*, JOHNSON, MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY 1925-1975 (1982).

In conclusion, although the Reagan proposal is a good one, the fact that foreign trade issues are commanding the nation's attention is more important than the specifics of any trade administration reorganization plan. The necessary technical adjustments to improve the trade position of the United States can be made: trade laws can be modernized, technological skill can be deployed, and marketing strategies can be improved. The failures of this administration in the trade area are not the fault of the system, the USTR, or the Secretary of Commerce—there are many other causes of failure, including specifically the failure of the President to speak and act clearly on trade issues and a failure to designate authority. The reorganization debate is only the beginning. The success of U.S. trade policy depends on the consideration and resolution of economic, political, and social factors. The world will little note nor long remember what happens to that debate if these basic problems are not addressed.